In The Supreme Court of Bermuda

COMMERCIAL COURT

2016: No. 345

IN THE MATTER OF STURGEON CENTRAL ASIA BALANCED FUND LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

CAPITAL PARTNERS SECURITIES CO LTD

Petitioner

-v-

STURGEON CENTRAL ASIA BALANCED FUND LTD

Respondent

JUDGMENT

(in Court)[1]

Petition seeking to wind-up company on just and equitable grounds-fund-rights of 'Participating Shareholders'-construction of bye-laws-whether just and equitable grounds made out

Date of hearing: June 12-13, 2017
Date of Judgment: July 14, 2017

[1] The present Judgment was circulated without a hearing to save costs.

Mr Mark Diel and Ms Katie Tornari, Marshall Diel & Myers Limited, for the Petitioner
Mr Stephen Atherton QC of counsel and Mr Steven White and Mr Samuel Riihiluoma, Cox Hallett Wilkinson Limited, for the Respondent

Introductory

1. The Defendant ("the Fund") was initially incorporated as a Bermuda exempted company on March 20, 2007 under the name of Kazakh Compass Fund, Ltd. The Fund is described as both a "closed-ended investment fund" (for Japanese regulatory purposes) but also as an open-ended fund (for Irish Stock Exchange purposes) with no automatic redemption rights. The Fund has primarily invested in natural resources in Kazakhstan. It is listed on the Irish Stock Exchange but its Participating Shares are not traded there. The shares were initially marketed in Japan.

2. The Petitioner ("CPS") was the sole distributor of the Fund and involved in its establishment. CPS is the registered holder of 7,561,000 of the Fund's issued 7,600,000 Participating Shares. This shareholding is comprised of 7,242,000 Shares held on behalf of its clients (the underlying beneficial owners or "UBOs") and 319,000 Shares held its own right. Prior to January 14, 2016, when 7,561,000 Participating Shares were transferred to CPS, Citivic Nominees held most of the shares. On June 27, 2016[2], this Court ruled that the Fund was required to rectify the register to give effect to that transfer.

3. On September 12, 2016, the Petition herein was presented seeking to wind up the Fund because:

    - the Fund's Core Documents were reasonably understood by the Participating Shareholders (including the Petitioner) to mean that the Fund would be wound up on December 31, 2015 or, at the latest December 31, 2017;

    - on May 8, 2014 the Board of Directors recommended adoption of the 2014 Amended Bye-laws which were adopted at the Annual General Meeting ("AGM") by the Management Shareholder with Participating Shareholders excluded from the right to vote;

    - the Amended 2014 Bye-Laws removed the Participating Shareholders' right to vote for a winding up altogether and granted a right to redeem 5% of their shares every two years which represented replacing the right to exit the Fund by December 31, 2017 at the latest with a 40 year term investment;

[2] [2016] SC (Bda) 68 Com (27 June 2016).

- these changes "*amounted to a breach of the fundamental terms and/or underlying basis and/or understanding on which the Participating Shareholders invested in the Fund*" (paragraph 54);

- "*the shareholders with the ultimate economic interest in the Fund wish the Fund to be wound up…*" (paragraph 66).

4. The Fund's case in a nutshell was that (1) it was established from the outset as an unlimited term investment with the Management Shareholder (Sturgeon Holdings Limited-initially Compass Asset Management Ltd.) alone being entitled to exercise voting rights, and that (2) CPS as an insider could not claim ignorance of these facts and seek to impose a contrary interpretation on the Core Documents.

The Bye-Laws (original version)

Winding Up

5. The merits of the present Petition largely depend on the interpretation of Bye-Law 78 ("*WINDING-UP/DISTRIBUTION BY LIQUIDATOR*") :

> "*78.1 The Shareholders may resolve by Special Resolution proposed at the Annual General Meeting held in the year 2014 to wind up and dissolve the Company with effect from 31 December 2015 subject to the right to extend the effective date of the winding up for a further two consecutive years but in no event shall such a period extend beyond 31 December 2017.*
>
> *78.2 If no Special Resolution is approved at the Annual General Meeting pursuant to Bye-Law 78.1, the Company may hold a Special General Meeting to determine the date, if any, on which the winding up and liquidation of the Company shall occur.*
>
> *78.3 If the Company is wound up, the liquidator may, with the sanction of a Resolution of the Shareholders and any other sanction required by the Act, divide among the Shareholders in cash or kind the whole or any part of the assets of the of the Company (whether shall consist of property of the same kind or not) and may for such purposes set such values as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the Shareholders or different classes of Shareholders. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trust for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no Shareholder shall be compelled to accept any shares or other assets upon which there is any liability.*"

6. The pivotal points of construction are:

(1) the meaning of "Shareholders" in Bye-Law 78.1 and whether or not Management Shareholders or Participating Shareholders are conferred the right to vote at an AGM or Special General meeting ("SGM"); and

(2) whether Bye-Law 78 in its original formulation provides that a winding up shall in any event occur no later than year-end 2017.

7. The term "Shareholder" is given a broad generic meaning with a definition probably reflecting that found in most Bermudian bye-laws with no distinction between participating and non-participating shareholders. On CPS's construction, Bye-Law 78 conferred a right on all "Shareholders" to decide at an AGM or SGM whether or not the Fund should be wound up. The 2014 Amended Bye-Laws, which purportedly removed this voting right, wrongfully varied the share rights of Participating Shareholders without their consent, CPS contends. The Fund counters that the voting rights conferred by Bye-Law 78 can only be understood by reference to the general provisions defining the rights attaching to the two main classes of shares.

8. The draftsman of the Bye-Laws could have denied counsel and this Court the intriguing challenge of having to unravel this most difficult first limb of the construction conundrum by explicitly providing either (a) that the winding up vote would be approved by a 'Special Resolution of the Management Shareholders', or (b) by not using the term "Special Resolution" at all. CPS nevertheless submitted that this term required a super-majority of both Management and Participating Shareholders. Cloudiness rather than clarity as to meaning arises because:

- "*Shareholder*" potentially includes both classes of shareholder;

- "*'Special Resolution' means a resolution requiring the consent of not less than three-fourths of the Shareholders passed in general meeting or, where required, of a separate class or separate classes of shareholders passed in a separate general meeting or in either case adopted by resolution in writing, in accordance with these Bye-Laws*";

- although it is straightforward to infer that "Shareholder" in relation to general meetings ordinarily means the Management Shareholder entitled to vote at general meetings, the use of the term "Special Resolution" is bedevilling since the Bye-Laws appear to contemplate a single Management Shareholder (the Investment Manager) which makes the need for a three-quarters majority vote (the same threshold required to vary share rights) otiose. The only other requirement for a "Special Resolution" is found in Bye-Law 83, which explicitly refers to "Participating Shareholders";

- a decision on winding up is in general terms a matter in relation to which one would expect Participating Shareholders to be interested in.

Classes of Shares and Share Rights

9. Bye-Law 1.1 contains the following definitions which are relevant in this regard:

"*'Management Shares' means ordinary voting, non-participating, non-redeemable shares of the Company entitling the holder(s) thereof to the rights and being subject to the restrictions set out in these Bye-Laws…*

"'Participating Shares' means non-voting participating shares in the capital of the Company entitling the holder(s) thereof to the rights and being subject to the restrictions set out in these Bye-Laws and where the context so permits includes Classes, Series of Classes and fractions of Participating Shares…"

10. Bye-Law 3 ("RIGHTS OF SHARES") provides, so far as is relevant for present purposes, as follows:

"*3.1 Management Shares*

The holders of Management Shares

3.1.1 shall be entitled to receive notice of , and attend and vote at, general meetings of the Company;

3.1.2 shall not be entitled to any dividend or other distribution;

3.1.3 shall, in the event of a winding-up or dissolution of the Company, whether voluntary or involuntary or for a re-organisation or otherwise or upon distribution of capital, be entitled to receive the amount of capital paid up on their Management Shares after payment of the capital paid up on the Participating Shares to the holders thereof, but, shall not be entitled to participate further in the surplus assets of the Company; and

3.1.4 shall not be entitled to redeem their Management Shares nor shall their Management Shares be subject to redemption at the option of the Company.

3.2 Participating Shares

The holders of the Participating Shares of each Class or Series of a Class

3.2.1 save to the extent provided by the Act and in these Bye-Laws shall not be entitled to receive notice of, nor to attend or vote at, general meetings of the Company;

3.2.2 shall, in the event of a winding-up or dissolution of the Company, whether voluntary or involuntary or for a re-organisation or otherwise or upon distribution of capital, be entitled to receive the amount of capital paid up on their Participating Shares in priority to the holders of the

Management Shares after payment of the capital paid up on the Management Shares to the holders thereof, to all surplus assets of the Company attributable to the Participating Shares, the relevant Class or Series of a Class (as the case may be); and

3.2.3 shall be entitled to such dividends as the Board may from time to time declare in respect of the Participating Shares of the Company, the relevant Class or Series of a Class (as the case may be);

3.2.4 shall, not be entitled to redeem their Participating Shares, and shall, subject to the provisions of these Bye-Laws, be subject upon notice from the Company to compulsory redemption of their Participating Shares based upon the Net Asset Value thereof."

11. There is what appears to be a standard provision in Bye-Law 4 that share rights may not be varied without the consent of 75% of the shares in each class.

12. The Fund relied on the above-cited provisions as demarcating a clear dividing line between voting Management Shares and non-voting Participating Shares. However, bearing in mind that Participating Shareholders have preferential distribution rights in respect of capital over Management Shareholders and exclusive rights over surplus, applying this interpretative approach to Bye-Law 78 leads to the following not uncomplicated results:

- 'Shareholder' for the purposes of voting at a general meeting to wind up the Fund means Management Shareholders alone (Bye-Law 78.1-78.2);

- it is unclear what practical function 78.1 and 78.2 serve if they do <u>not</u> require a vote on winding-up with a longstop-date of December 31, 2017;

- in the context of Bye-Law 78.3, Shareholder means either Management Shareholder for voting in the liquidation and Participating Shareholder as regards distribution rights. Or, alternatively, 'Shareholder' <u>in a winding-up</u> includes both classes of shareholder;

- there is on the face of it an inherent inconsistency in the idea of Participating Shareholders enjoying priority rights in a liquidation without any corresponding right to decide to wind up the Fund.

Redemption rights

13. Bye-Law 12 merits mention because it was modified in 2014. Bye-Law 12.1 provided that there were no redemption rights at the option of Participating Shareholders and 12.2 conferred a compulsory redemption power on the Fund.

.

Express voting rights conferred on Participating Shareholders

14. One example of express voting rights being conferred on Participating Shareholders is provided by Bye-Law 83, which was indirectly referred to in the course of argument[3]:

> "*83. CHANGE OF INVESTMENT OBJECTIVE*
>
> *The investment objective and policies of the Company during the period of three years from the date of admission of the Participating Shares to the Official List of the Irish Stock Exchange may only be changed with the approval of a Special Resolution of the holders of the Participating Shares.*" [Emphasis added]

15. This is not an entirely insignificant provision, because it appears to be the only other instance in the Bye-Laws in which the requirement for a "Special Resolution" appears.

The 2014 Amended Bye-Laws

16. The following new provisions were inserted in 2014 by way of amendment:

> "*12.1 Subject to Bye-Law 12.2, the holders of Participating Shares have no right to require their Participating Shares to be redeemed by the Company.*
>
> *12.2 Subject to Bye-Law 12.2* [sic], *(a) each holder of Participating Shares may request redemption of 5% of its Participating Shares every two calendar years effective from 1 March 2015 and (b) each holder of Participating Shares may request redemption of its Participating Shares at any other time, and the Board may, in its absolute discretion and subject to the Company having available cash, consider requests from Shareholders to redeem their Participating Shares. Any such redemptions will be on such terms as the Board decides, provided that if the Company agrees to redeem any Participating Shares it must offer that right of redemption to all holders of Participating Shares pro rata. Any such redemptions may only be made at a redemption price per Participating Share that represents a discount of not more than 15 per cent of the Net Asset Value per Participating Share.*"

[3] It is mentioned in an email dated April 4, 2007 from Appleby to CPS and others involved in the Fund's establishment: P2 Volume 4 page 4687.

17. The new Bye-Law 78 simply deletes the old 78.1 and 78.2 and consists of the old 78.3:

> "*78. If the Company is wound up, the liquidator may, with the sanction of a Resolution of the Shareholders and any other sanction required by the Act, divide among the Shareholders in cash or kind the whole or any part of the assets of the Company (whether shall consist of property of the same kind or not) and may for such purposes set such values as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the Shareholders or different classes of Shareholders. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trust for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no Shareholder shall be compelled to accept any shares or other assets upon which there is any liability.*

Other Core Documents

The Subscription Agreement

18. Subscribers acknowledge that their application for shares is made "*on the terms*" of the Placing Memorandum and "*subject to the provisions of the Company's Memorandum of Association and Bye-laws from time to time in force*". They also confirm that they have not "*relied on any representations or statements made or information provided by or on behalf of the Company other than information contained in the Placing Memorandum*". Accordingly, the most significant Core Document other than the Bye-Laws is the Placing Memorandum.

Placing Memorandum

19. The Placing Memorandum is replete with hazard warnings and indicates that investment was only suitable, *inter alia*, for sophisticated, long-term investors. However, as regards the construction of Bye-Law 78 and the question of whether it limits the term of the Fund and/or confers a right on Participating Shareholders to extend the term in general meeting, the following provisions are of particular interest:

- "*Investment Term The term of the Company commencing on the date of issue of the Participating Shares and ending on such date as may be determined by the holders of the Management Shares by Special resolution at the general meeting held in the year 2014, being 31 December 2015 or such later date as so determined but in no event later than 31 December 2017.*" (Definitions)

- "*The Investment Manager, as holder of all the Management Shares, controls all of the voting interests in the Company, except on proposals to vary the rights of Participating Shares, and may make such changes to the to the Memorandum of Association and Bye-*

Laws of the Company as it deems appropriate…An investment in the Company should be regarded as a passive investment" (5.2)

- "*All the holders of the participating Shares have the same rights, whether in regard to voting, dividends, return of share capital and otherwise…Voting rights: save to the extent provided by the Companies Act and in the Bye-laws, each holder shall not be entitled to receive notice of, nor to attend or vote at, general meetings of the Company…Winding-up rights: Each holder shall, in the event of a winding-up or dissolution of the Company, whether voluntary or involuntary or for a re-organization or otherwise upon distribution of capital, be entitled to a return of the capital paid up on their Participating Shares in priority to the holders of the Management Shares and, after payment of the capital paid up on the Management Shares to the holders thereof, to all surplus assets of the Company attributable to the Participating Shares. See the sections entitled 'Supplementary Information about the Company-winding up'.*" (7.3)

- "*The Company has been established for an unlimited duration. However, at the annual general meeting of the Company held at the year 2014, a Special resolution to wind up the Company effective 31 December 2015 or 31 December 2017 shall be put before the meeting. If a Special Resolution is not passed, a special general meeting will be called for the purpose of reconsidering the date on which the winding up will occur*." (8.2)

- "*If the Company is wound up the liquidator may, with the sanction of a Special Resolution of the Company and any other sanction required by the applicable law, divide among the Shareholders in specie or kind the whole or any part of the assets of the Company…and may determine how such division shall be carried out as between the Shareholders*…." (8.5.7)

- "*…The intended investment term is seven years, subject to reduction or extension as provided herein. The Company is a closed-end company. Shares in the Company are not redeemable or re-purchasable at the option of the investor.*" (page 98 of 98)

20. The most noteworthy aspects of the Placing Memorandum are the following:

- the Placing Memorandum is internally inconsistent in the way in which it defines the investment term, ranging from defining it as a fixed term which will end no later than December 31, 2017 to a term of seven years which may be extended or reduced;

- the Placing Memorandum is internally consistent and consistent with the Bye-Laws in the way it defines rights attaching to shares including voting rights;

- the Placing Memorandum suggests that an AGM or SGM "shall" be held to determine the winding-up date, being either year end 2015, 2017 or some other date. The Bye-Laws state in permissive terms that the holding of such meetings "may" take place;

- the Placing Memorandum states that on a winding-up distribution rights will be determined by "*a Special Resolution of the Company*" (which according to the Fund's construction would mean the Management Shareholders). Bye-Law 78.3 and Amended Bye-Law 78 confers the sanctioning power in a winding up on "*the Shareholders*" in terms which do not necessarily imply a voting right corresponding to the voting rights referred to under 78.1 and 78.2 in respect of general meetings;

- the term "*Special Resolution*" is defined to mean a vote of "*not less than three-fourths of such Shareholders as, being entitled to do so, vote….at a general meeting of the Company*". The use of this term (which implies a vote by several shareholders to vary existing share rights) in the context of voting by a single Management Shareholder to wind up is puzzling. It is no less puzzling in the context of voting on distribution rights because the Participating Shareholders are given priority rights over the Management Shareholder and so on any vote contrary to a distribution would have to be approved by Participating Shareholders in any event.

The Prospectus

21. The Participating Shares were also marketed in Japan through a Prospectus written in Japanese. The Prospectus contained two notable clauses:

- "*Investment Term*" was defined in the same way as the Placing Memorandum, to the extent that it also stated that winding up would occur "*in any event no later than 31 December 2017*". However, the English translator's note suggests the possibility of that date being extended was mentioned elsewhere in the Japanese version of the document;

- "*Investment Term*" was also defined like the Placing Memorandum to the extent that the definition envisaged the winding up vote would be by "*Special Resolution*" (i.e. a resolution of three-quarters of shareholders). This implied (potentially at least) a vote by Participating Shareholders as well since it was contemplated that the Management Shares would be all held by a single Investment Manager.

Drafting history of the Core Documents as adopted in 2007 and as amended in 2014

22. Reference was made in the course of argument to correspondence and draft documents relevant to the evolution of the Core Documents. CPS argued that these supported its reasonable understanding of what its share rights were and the Fund argued that the documentary record as to CPS's involvement made it wrong for it to complain of misrepresentations in the same way which an outsider might seek to do. More significantly still, the drafting history showed that CPS positively knew that Participating Shareholders were not intended to be accorded voting rights under Byelaw 78.

23. The historical documents do, in a general sense, support each side's position to varying extents. Ultimately, whether CPS can seek a winding up Order based on an improper variation of its Participating Share rights is to be determined by a construction of the Bye-Laws and an assessment of whether the Fund's management acted so improperly as to justify the extraordinary remedy of a winding up order. CPS is clearly, in general terms, an insider with no right to complain that it was misled by inconsistent statements made in the Placing Memorandum. For example:

- on March 29, 2007, CPS circulated a draft of the Placing Memorandum under cover of an email which noted that "*Participating Shares have no voting right*", "*it needs a Special Resolution to wind up*" and "*initially we assume 7 year duration*";

- on April 4, 2007, CPS received an email from the Fund's then lawyers, Appleby, which stated:

  "*I confirm that the Bye-Laws of the company provide that participating shares (in general) have no voting rights save for circumstances in which the rights attaching to the shares are to be modified, and that the participating shares are not entitled to attend or receive notice of the annual general meeting of the company or vote thereon , therefore I have amended bye-law…78 of the Bye-laws to make it clearer that the that the approval which is required to place the company in voluntary liquidation is given by the holders of the management shares only. Please find clean and marked copies of the Bye-laws attached showing the changes I have made since the previous version which was circulated to you. I would be grateful if the parties could confirm that this document is acceptable.*

  With respect to Bye-Law 83, I confirm that the special resolution which is required by the participating shares would have to be passed at a separate meeting of the holders of those shares or by way of written resolution… " [emphasis added];

- with effect from January 1, 2013, CPS entered into a seven year Promotion Agreement with Sturgeon Capital Ltd, the Investment

> Manager, in relation to the Fund. This would expire on December 31, 2020, well after the December 31, 2015 and 2017 wind up dates it contended the Bye-Laws provided for.

24. If a single document provides a possible clue as to why CPS would today genuinely believe its Petition is a valid one, it is the January 26, 2013 email from Appleby to Fund director Taco Sieburgh Sjoerdsma which advised the Investment Manager:

> "*…it is possible to amend Bye-Law 78 to include that this is subject to AUM being less than 20 million. This change could be done with the consent of the Board and Management Shareholder. However, if you wished to change the 31 December 2017 date or delete the provision in its entirety that this would need the consent of the Board and all categories of shareholders including Participating Shareholders.*"

25. Mr Sieburgh in his Third Affidavit acknowledges that when the Bye-Law changes were discussed at the next Board meeting on February 27, 2013, CPS's nominee director Mr Toyoharu Tsutsui indicated he had not received the proposed changes from Appleby. The advice about Participating Shareholder approval being required to change the December 31, 2017 date in Bye-law 78 was not recorded in the Minutes. Mr Tsutsui is not a deponent in these proceedings but it was not disputed that he gained access to the Appleby "opinion" at some point. When is unclear. He attended the Board Meeting on December 19, 2013, and is not recorded as protesting when Mr Sieburgh indicated that he would look for "new legal help" in Bermuda because Appleby was not responsive enough. It seems inherently believable that Mr Tsutsui was by this time aware of the Appleby "advice" but had no reason to believe that a different opinion would be obtained regarding the longstop date issue from new lawyers. On the other hand he did not mention the opinion at the next Board meeting when it would have supported his position.

26. The dispute about amending Bye-Law 78 came to a head much later, at the May 8, 2014 Board Meeting. A Cox Hallett Wilkinson lawyer attended and advised the Board that Participating Shareholder approval was not required to remove the longstop date. A formal opinion letter on this and other issues was prepared by her firm on May 7, 2014. Mr Tsutsui is recorded as vigorously opposing the change and threatening a "lawsuit". Oddly, CPS's nominee makes no mention of the earlier contrary Appleby opinion and is only recorded as complaining about prejudice to the Japanese investors in general terms. The Board approved the amendments to the Bye-Laws by a majority and also resolved to refer the changes for shareholder approval at the AGM. Later that same day at the 2013 AGM, the Management Shareholder approved the 2014 Amended Bye-Laws by Unanimous Written Resolution.

27. A high level view of the impact of the drafting history of the Core Documents is that this history (a) potentially supports the Fund's position that from the outset CPS understood or ought to have understood that the Management Shareholder had the right to amend Bye-Law 78, and (b) more clearly supports the Fund's case that CPS could only reasonably have understood that the so-called Longstop Date was <u>not</u> cast

in stone. This view of the history also undermines CPS's current assertion that the construction the Fund contends for is inconsistent with commercial common sense. The proposition that the Management Shareholder alone was able to amend the Bye-Laws to remove Bye-Law 78 was only explicitly contradicted by the informal advice furnished by Appleby in its February 26, 2013 email. However, that email was prompted by the desire of the Board to clarify who had the right to vote, the Management Shareholder's nominee director appearing to assume that Participating Shareholders could indeed vote[4]. However, CPS's construction was also broadly supported on the face of the Core Documents themselves by the way in which:

(a) "Investment Term" was defined in the Placing Memorandum and the Prospectus,

(b) the admittedly complicated implication arising from the same definition that amending the longstop winding up date required Participating Shareholder approval because a "Special Resolution" made little sense if required of a single Management Shareholder;

(c) the no less complicated similar implication arising from the use of the term "Special Resolution" in Bye-Law 78.1 and 78.2, linked with a definition of "Special Resolution" which is somewhat more favourable to CPS than the corresponding definition in The Placing Memorandum and the Prospectus.

28. The December 20, 2012 Board meeting minutes records the following discussion with CPS relying on Mr Sieburgh's statements and the Fund relying on Mr Tsutsui's statements:

"

- *TS states that the bylaws need to be changed, and he specifically wants to eliminate clause 78. They need to figure out how to remove it. Either to have a shareholders meeting in March or have a special shareholders meeting so that the people can vote on the new articles.*
- *TT says that they need to have a structure to convince investors.. If the fund is a good size it will continue forever. In Japan there is no maturity for the fund. That is the Japanese style. TS says that they are proposing that the shareholders have a meeting following the presentations, the shareholders will get to vote on*

[4] Mr Sieburgh at a Board meeting on December 20, 2012 referred to in the 10th Affirmation of Mitsugu Saito (at paragraph 26), discussed further below.

the new bylaws which will include clauses of share buy back but will exclude clause 78 re winding up….

- *TS to check with Appleby what the voting procedures are…*"

29. The quoted Minutes support two very clear conclusions on what the parties' nominee directors mutually understood the Bye-Laws to mean, in December 2012 at least. Firstly, it was common ground that there was no longstop date and that the initially assumed end date of December 31 2017 could be extended. Secondly, it was common ground that Participating Shareholders should be entitled to vote on the exclusion of the winding-up provisions in Bye-Law 78. The initial assumption by the Board that Bye-Law 78 conferred voting rights on all "Shareholders" is at least illustrative of the point that this limb of CPS's construction argument is consistent with a straightforward reading of Bye-Law 78. Neither of the directors (nor the lawyer who sent the informal Appleby advice on February 26, 2013) was aware of or had in mind the April 4, 2007 email from Appleby. This email would have revealed that Bye-Law 78.2 had explicitly been redrafted to "*make it clearer*" that only Management Shareholders had the right to vote because the following words had been deleted from an earlier draft:

> "*At the special general meeting, the holders of the Management Shares shall shall have voting rights equal to three times the number of Participating Shares then in issue calculated on a pro rata basis, with fractional shares being rounded up to the next decimal point.*"

30. It would have been clearer still if Bye-Law 78 had been re-drafted to exclude any mention of a "Special Resolution" at all, but this earlier draft strongly supported the Fund's construction on the voting rights issue, but (as will be seen below) the Fund concedes that such extrinsic evidence is inadmissible for the purposes of construction. Earlier in the drafting process, another Appleby lawyer in an email on March 20, 2007 had astutely queried (in relation to the 'OM') whether it was appropriate to keep the special resolution concept in Bye-Law 78 since only one Management Shareholder would in practice be voting. That point was not taken up as the term "Special Resolution" remained in the final versions of both the Placing Memorandum and the Bye-Laws.

31. Japanese lawyer Fumiaki Shimazaki (on whom CPS claim to have relied in the drafting process) in an email earlier on April 4, 2007 to Appleby and, *inter alia*, Mr Ueoka of CPS clearly viewed the existing wording as suggesting that Participating Shareholders had a right to vote and requested the clarification in the wording that Participating Shareholders <u>did have</u> a right to vote on winding up:

"…*This wording implies that the holders of Participating Shares are entitled to vote at the SGM. If that is the case, I think that section 78.2 should be reworded so as to clearly indicate that the holders of Participating Shares are entitled to a voting right at least at the SGM to be held under section 78.2. If such voting right is to be conferred upon the holders of Participating Shares in the event of the proposed winding-up and dissolution.*"

Section 83 provides for the change of investment objective. Here a Special Resolution of the holders of Participating Shares is mentioned…"

32. So it was this query which prompted the change of wording designed to "make it clearer" that Participating Shareholders had no right to vote on winding up under Bye-Law 78. There was uncertainty as to who could vote six years later as the 2014 AGM approached. Nevertheless, the background to the drafting of the original version of Bye-Law 78 and the adoption of the 2014 Amended Bye-Laws provides little or no support for CPS's contention that it reasonably expected that a winding up no later than year-end 2017 would take place.

The Participating Shareholders' Vote

33. CPS by letter to the UBOs dated May 9, 2014, the day after the AGM which purportedly extinguished any obligation to convene a meeting to consider a winding up, sought input on the liquidation question. The letter (signed by Mr Tsutsui) stated:

"…*As for Sturgeon Central Asia Fund, for which you hold the participation shares ("The Fund"), it is stipulated in its prospectus that a special resolution for the liquidation of the Fund with effect on the date stipulated therein may be passed at the Class Shareholders Meeting by Participation Shareholders scheduled in 2014. ("The date stipulated' is deemed to be December 31, 2017, according to the prospectus).*

Accordingly, may we ask you to give us your reply as to whether you wish or not for the liquidation…."

34. Just over 80% of the then UBOs supported the liquidation option. This evidence had more symbolic than substantive significance to the merits of the Petition. It signified that those with an economic interest in the Fund were, in a general sense, having their commercial interests denied. It also supported the hypothesis that if Participating

Shareholders had been permitted to vote at the 2014 AGM, they might likely have voted in favour of a winding up at year end 2015 or 2017.

The commercial context

35. CPS relied heavily on the commercial prejudice it contended flowed from the construction of the Bye-Laws contended for by the Fund to supports its own interpretative case. The proposition that investors would not elect to invest in a fund they could not control the exit from was attractive in a general sense, but not materially persuasive. If the investors had in fact signed up for just such an investment, the fact that some investors might find such a product unattractive was completely irrelevant. I also accepted the Fund's riposte that the internal trading CPS had itself been carrying out proved that some exit was indeed possible. CPS had itself declined to take up at least one significant purchase offer for reasons which were not entirely convincing. I find that options did potentially exist for CPS itself to create a secondary market for the Participating Shares. Mr Atherton QC for the Fund relied heavily in terms of characterising the commercial context of the present dispute on what he described as the "hedge fund professional view". In his First Affidavit, independent director Michael Carter deposed:

> "*31. I believe the Court should be wary of investors simply wanting to get out of investments they now regret. The structure of the Fund is a fairly common one among hedge funds, and it could have ramifications for the industry in Bermuda and the enthusiasm of managers to commit considerable time and resources to a fund if the only question on a just and equitable winding up petition is to ascertain whether the majority of shareholders wish to wind the fund up. A hedge fund is primarily an investment vehicle following strict rules, which will vary whether the fund is open or closed ended.*"

36. This commercial argument is probably generally sound. But it does not engage with the main thrust of the present Petition viewed in light of the Petitioner's legal arguments at trial. It ignores the complaint that the bargain investors struck with the Fund was that they would be able to vote on whether or not to extend the duration of the Fund past December 31, 2017 and that they were wrongfully deprived of that right in breach of the Fund's constitution. Upholding that complaint would not imply that hedge fund investors who have no contractual right to seek a liquidation would be able to seek a winding-up order as of right on the just and equitable ground.

37. However, in his Second Affidavit, Michael Carter made a point which was more germane to the question of whether it was commercially rational for Participating Shareholders to have such limited rights:

> "*29. An important consideration in incorporating the clause 78 in such a manner related to the ability of the Fund to be listed on the ISE, where the inclusion of a redemption ability at least once in the life time of the fund, on this occasion at the discretion of the management shareholders, qualified*

the Fund as an open-ended fund structure according to ISE requirements (contrary to Japanese classification of the Fund as closed-ended). This ISE classification was important, as it meant less onerous disclosure requirements, such as publishing a semi-annual report and other matters, thus lower administrative costs for the benefit of investors."

38. This averment is not challenged in the Tenth Affidavit of Mitsugu which asserts that relevant issues in the Second Affidavit of Carter have already been dealt with in his earlier Affirmations, the Petition or the Reply to the Defence. Paragraph 44 of the Points of Defence averred that the purpose of Bye-Law 78 was to achieve lower regulatory requirements from the ISE. In paragraph 21 of the Petitioner's Reply, this paragraph is denied and the Respondent is put to strict proof of the regulatory reason for the inclusion of Bye-Law 78 and the fact that CPS knew of the reason. The Second Carter Affidavit proves the regulatory reason (paragraph 29). However paragraph 31 only proves that CPS knew (through the drafting process) of the intent to exclude Participating Shareholders from voting on winding up, not the regulatory reason. That said, I find that the commercial context in which Bye-Law 78 was originally adopted was one in which it was mutually understood by the Investment Manager and CPS that Participating Shareholders were to have as little control over the Fund as possible, both in general management terms but as regards the right to seek a winding up as well.

Legal findings: principles governing the construction of the Bye-Laws: the admissibility of extrinsic evidence

39. In my judgment there was only one pivotal question which arose as to rules of construction: is the April 4, 2007 email from Appleby clearly signifying the intention to limit voting rights under Bye-Law 78 to the Management Shareholder admissible against CPS as part of its background knowledge of the intended meaning? If this evidence is admissible for such purposes, the first limb of CPS's argument on the meaning of Bye-Law 78 (that "Shareholders" includes "Participating Shareholders") can only properly be rejected. Although the Fund conceded that point in CPS's favour, it may be helpful to rehearse the relevant principles which have not been seemingly previously considered by a Bermudian court.

40. The guiding general principles on contractual construction were recently summarised by Lord Neuberger *Arnold-v-Britton* [2016] 1 All ER 1 at pages 5-6, and was referred to by Mr Atherton QC in the course of argument:

"*14. Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900.*

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all

the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

41. This passage, incidentally, was subsequently approved by the Judicial Committee of the Privy Council in *Ennismore Fund Management Limited-v-Fenmore Consulting Limited* [2016] UKPC 9 (per Lord Clarke at paragraph 17). On the specific topic of facts known to the parties, Lord Neuberger in *Arnold-v-Britton* went on to explain:

> "*[21]…When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties…*"

42. If those principles applied to the Bye-Laws, the parties' mutual understanding as to the drafting history of Bye-Law 78, and the intention to "make it clearer" that only the Management Shareholder could vote, would have been admissible.

43. Mr Atherton QC placed before the Court authority which undermined the proposition that these ordinary contractual construction principles applied without modification to the statutory contract embodied in a company's bye-laws. This was the English Court of Appeal decision in *Bratton Seymour Service Co. Ltd.-v- Oxborough* [1992] BCLC 693. This decision supports a general prohibition on using extrinsic evidence about what those involved in the establishment of company knew about, *inter alia*, the drafting history of the bye-laws in a subsequent interpretation of the registered bye-laws. The following judicial statements are pertinent in this regard:

- Dillon LJ (at 696f-h): "*It is said, "Oh, the articles constitute a contract between the company and its members, and so you can imply any term*

into such a contract as you can imply any term into any other contract in order to give business efficacy". But the Articles of Association of a company differ very considerably from a normal contract. They are a document which has statutory force. If a company, limited by shares, chooses to have Articles of Association instead of merely relying on Table A, then those articles have to be registered. These articles were registered when the company was incorporated. The articles thus registered are one of the statutory documents of the company open for inspection by anyone minded to deal with the company or to take shares in the company. It is thus a consequence, as was held by this court in Scott v. Frank F. Scott (London) Ltd [1940] Ch. 794 , that the court has no jurisdiction to rectify the Articles of Association of a company, even if those articles do not accord with what is proved to have been the concurrent intention of the signatories of the Memorandum at the moment of signature.

It is because of the statutory force of the articles, when registered, that that conclusion was reached. The articles, if not in accordance with the intention of the subscribers, have to be altered by the statutory procedure of a special resolution if the appropriate majority of the members agree to such an alteration."

- Steyn LJ (at 698h-699a): "*Here, the company puts forward an implication to be derived not from the language of the Articles of Association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law, can never succeed in the case of Articles of Association. After all, if it were permitted, it would involve the position that the different implications would notionally be possible between the company and different subscribers. Just as the company or an individual member cannot seek to defeat the statutory contract by reason of special circumstances such as misrepresentation, mistake, undue influence and duress and is furthermore not permitted to seek a rectification, neither the company nor any member can seek to add to or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances. If it were permitted in this case, it would be equally permissible over the spectrum of company law cases. The consequence would be prejudicial to third parties, namely, potential shareholders who are entitled to look to and rely on the Articles of Association as registered.*"

- Sir Christopher Slade (at 699g-700a): "*I accept that, in construing the*

articles of association of a company, evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, places or other subject matter referred to therein. Mr Asprey, however, has not invoked extrinsic evidence of surrounding circumstances in the present case for that limited purpose. He has sought to invoke it for the purpose of imposing additional financial obligations on the members far beyond those which the language of the articles of association of the company, read fairly on its own, would impose on them, because, he says, such an implication is required to give the articles business efficacy. No authority has been cited to us which begins to support the proposition that extrinsic evidence is admissible for that wide purpose in construing the statutory contract created by the articles of association of a company. In my judgment, the admission of such evidence for such purpose would be quite contrary to the principles governing this type of statutory contract. If it were to be admissible, this would place the potential shareholders in a limited company, who wished to ascertain their potential obligations to the company, in an intolerable position. They are in my judgment entitled to rely on the meaning of the language of the memorandum and articles of association, as such meaning appears from the language used."

44. These judicial observations clearly undermine the proposition that CPS, *qua* shareholder, should be bound by a distinctive interpretation of the Fund's Bye-Laws based on its own peculiar knowledge, acquired in its capacity as prospective Placement Agent, of the negotiating process. Or, to put it another way, it is difficult to see why the prohibition on the use of extrinsic evidence relating to the circumstances in which bye-laws are adopted should not apply in the present case where the extrinsic evidence is being relied upon to crucially determine the extent of Participating Shareholders' rights. While the Fund's counsel conceded this principle in his written and oral submissions, this position was somewhat obscured in the course of the hearing because of the enthusiastic emphasis which Mr Atherton QC placed in oral argument on the drafting history of the Bye-Laws. Having reserved judgment, however, my own researches confirmed that the special legal status of bye-laws meant that the sort of extrinsic evidence about negotiating history, upon which the Fund apparently relied in the present case and which was clearly available for the construction of ordinary contracts, was not admissible for construing company bye-laws at all.

45. The Judicial Committee of the Privy Council has considered it uncontroversial that extrinsic evidence is generally not admissible as an aid to construing a company's constitutional documents. In *HSBC Bank Middle East and others -v-Paul Clarke (as liquidator of the Oracle Fund Limited) and others* [2006] UKPC 31, Lord Clarke stated as follows:

> "*4. It is therefore necessary to set out the facts in some detail. But there are severe limits on the use of evidence of surrounding circumstances as an aid to the construction of a company's constitutional documents: see Bratton Seymour Service Co Ltd v Oxborough [1992] BCLC 693, in which Steyn LJ said at p698:*
>
> > *'I will readily accept that the law should not adopt a blackletter approach. It is possible to imply a term purely from the language of the document itself: a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances.*
> >
> > *Here, the company puts forward an implication to be derived not from the language of the articles of association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law, can never succeed in the case of articles of association. After all, if it were permitted, it would involve the position that the different implications would notionally be possible between the company and different subscribers.'*
>
> *Similarly, Sir Christopher Slade observed at p699:*
>
> > *'I accept that, in construing the articles of association of a company, evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, places or other subject matter referred to therein. [Counsel], however, has not invoked extrinsic evidence of surrounding circumstances in the present case for that limited purpose. He has sought to invoke it for the purpose of imposing additional financial obligations on the members far beyond those which the language of the articles of association of the company, read fairly on its own, would impose on them, because, he says, such an implication is required to give the articles business efficacy. No authority has been cited to us which begins to support the proposition that extrinsic evidence is admissible for that wide purpose in construing the statutory contract created by the articles of association of a company. In my judgment, the admission of such evidence for such purpose would be quite contrary to the principles governing this type of statutory contract.*"

46. More recently, the *Bratton Seymour* decision was followed and more fully explained by David Richards J (as he then was) in *McKillen-v-Misland Cyprus Investments Lmited* [2011] EWHC 3466. Justice David Richards opined as follows:

"*60. There was disagreement between the parties as to whether the applicable pre-emption provisions were those in clause 6 of the shareholders agreement or those in article 5 of the company's articles of association. Misland argued* for *the latter and it relied on the authorities which establish that the factual background admissible in the construction of contracts is for the most part not admissible in the construction of articles of association. In the alternative, Misland submitted that even if all the relevant background admissible in the construction of contracts was taken into account, the sale of Misland did not trigger the pre-emption provisions.*

61. The particular position of articles of association was considered by the Court of Appeal in Bratton Seymour Services Co Ltd v Oxborough [1992] BCLC 693. It was held that a term might be implied into articles by way of constructional implication but not from extrinsic circumstances.

62. Articles of association have a special status as a "statutory contract", adopted pursuant to the Companies Act, requiring public registration and capable of amendment by special resolution. By reason of these provisions, the court has no jurisdiction to order rectification of articles or to set them aside on grounds of misrepresentation.

63. While these features are important, none of them is sufficient to explain why extrinsic evidence is not admissible in the construction of articles. In my judgment, the reason for excluding such evidence as an aid to construction is as stated by Sir Christopher Slade and Steyn LJ. The articles govern relations between the company and its members and between the members. The members are a fluctuating body of persons. Persons will become members on the basis of the registered articles and without, in most cases, any knowledge of the circumstances existing when the articles were adopted or were subsequently amended, perhaps on many occasions." [Emphasis added]

47. Somewhat confused as to what the Fund's position was on the admissibility of evidence which would significantly assist their case on construction, on July 3, 2017 I afforded counsel for the Fund an opportunity to submit within seven days supplementary written submissions on this issue. The Court received on July 10, 2017 considerable assistance and clarification of the Fund's position. Most crucially, the following supplementary submission was made:

"*The extrinsic evidence which the Fund has made reference to from 2007 has not been and was not deployed or relied upon by the Fund as an aid to construction, but in order to rebut the assertion made by CPS as to its alleged (subjective) understanding in relation to the contractual terms that governed the investment by it in the Fund. The evidence from 2007, as submitted at the hearing, plainly shows that CPS could not have had and did not have the understanding for which it now contends. It ought therefore to be apparent that the evidence is not relied upon by the Fund*

to construe the terms of the relationship between it and CPS, merely to counter CPS's assertion of what it (subjectively) understood the position to be."

48. The subtleties of the Fund's position were certainly not properly understood by me in the course of argument, although it is far easier to apprehend the position when the Fund's original written submissions are read together with the supplementary ones. The emphasis which the Fund's counsel placed on *Arnold-v-Britton* [2016] 1 All ER 1 in the course of oral argument as to the admissibility, as an aid to construction, of "*the facts and circumstances known or assumed by the parties at the time that the document was executed*"[5] appeared to me to be deployed to set up a case for relying on that 2007 drafting history as a "killer point" on the construction issue. On any view, it requires very rigorous analysis indeed to be aware of conclusive evidence that the parties drafting the Bye-Laws mutually intended a clause to have a particular meaning, and to exclude that fact from one's interpretation of the language of the relevant Bye-law. I caution myself against the risks of allowing the compelling extrinsic evidence as to what the drafters of the clause intended to mean to influence my interpretation of the meaning of the Bye-Law in its context for the purposes of the world at large.

49. Be that as it may, the present case illustrates *par excellence* the logic behind the exclusionary rule. In the present case CPS, which happened to be involved in the drafting of the Bye-Laws, was not initially the registered holder of any of the Participating Shares. Should the interpretation of the Bye-Laws yield one result in the context of proceedings brought by CPS, and another meaning in the context of proceedings brought in respect of precisely the same shares by a party who was not involved with the drafting of the Fund's Core Documents? I am bound to find that extrinsic evidence as to the negotiating history is not admissible as an aid to construing the Bye-Laws for recognised reasons of legal policy. As this is in effect a finding in favour of CPS on this particular issue (a contrary finding would have made its construction case wholly unarguable), I saw no need to invite further submissions from CPS on the point.

Legal findings: other rules of construction

50. The main rule of construction which CPS relied upon was not inconsistent with the exclusion of extrinsic evidence for construing byelaws. Nor did it depend on subjective intentions. It was essentially based on the judgment of Kay LJ in *Aircare Ltd.-v-Wyatt Sellyeh* [2015] Bda LR 32 (at paragraph 8), where he approved, *inter alia*, Lord Diplock's observation in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 that:

[5] Paragraph 14.

"*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business common sense.*"

51. CPS in the alternative to its primary construction arguments invoked the *contra proferentem* rule in its Skeleton:

"*83…CPS was not legally qualified to and did not finalize or approve the Core Documents …CPS looked to and relied on Mr Shimazaki (appointed by the Fund to act on its behalf as its legal expert) and Appleby as the legal experts on these matters…As such it is entirely proper for the wording in the 2007 Bye-Laws and the Core Documents to be construed against the Fund if this Court is of the view that there is any ambiguity.*"

52. CPS's right to rely on this rule was not as such disputed. It follows that to the extent that the Bye-Laws are ambiguous CPS is entitled to rely upon the *contra proferentem* rule.

53. The Fund disputed the legal validity of construing the Core Documents in the liberal manner which CPS implied was both appropriate and required. CPS could point to no authority supporting liberal reference to documents such as the Placing Memorandum and the Prospectus as an aid to construing the Byelaws generally. The Fund contended that the only relevant documents were the Bye-Laws and the Placement Memorandum, but only to the extent that those documents were relied upon for the purpose of evidencing the terms upon which the Participating Shares were allotted. Mr Atherton QC rightly submitted that the extent to which use could be made of the Placing Memorandum was limited by the Judicial Committee's decision in *Culross Global SPC-v- Strategic Turnaround Master Partnership Ltd.* [2010] UKPC 33:

"*31. In these circumstances, there is every reason to read the reference in article 17 to shares being issued 'Subject to these Articles' on 'the terms referred to in the [CEM]' as referring only to those terms of the CEM which identify the terms of subscription - in particular as regards timing, numbers, par value and price - set out in the CEM, and not to the description in the CEM of the terms of the articles relating to matters such as redemption. This is consistent with the only references in the articles to the CEM appearing under the heading 'Issue of Shares'. There are no references to the CEM under the headings in the articles dealing with Redemptions, NAV and Suspension. It also follows from the statements in the CEM set out in para 12 above that, even if the articles were treated as referring more extensively to the CEM, the reference would be circular, since the CEM refers back to the articles, and makes clear that the legal relationship between the Respondent and its shareholders is defined by the articles, not the CEM. These points dispose of the Respondent's submission that the articles and CEM can in some way be read together, with the former supplementing the latter, where not flatly inconsistent.*"

54. In the present case CPS was unable to rely upon a Bye-Law incorporating any provisions of the Placing Memorandum, but rather pointed to wording in the Subscription Agreement. This wording on its face gave primacy to the Fund's constitutional documents as regards the substantive legal relationship between the Fund and subscribers once the relevant shares were issued. Accordingly, the Bye-Laws comprise the crucial document which was must be interpreted, as the Fund rightly contended.

Findings: construction of original Bye-Law 78

55. One interpretative argument advanced by CPS can be disposed of shortly. The drafting history in my judgments makes it impossible to credibly argue that the interpretation contended for by the Fund of Byelaw 78 (in its original form) "*flouts business common sense*". CPS's role in relation to the Fund was to market the Participating Shares to Japanese investors, and when the draft Byelaw 78 was amended April 2007 to "make it clearer" that the investors had no right to vote on winding-up, neither CPS nor the Japanese lawyer upon whom CPS relied raised a word of dissent. While this silence is not dispositive, it is powerful evidence that persons who one would expect to be sensitive to how an investment product would be received by Japanese investors were not motivated to exclaim instinctively that for investors to be given no voting rights in relation to winding up would be wholly unacceptable.

56. The task of construing the Bye-Law in its context is a nettle which must at last be grasped. Bye-Law 78 provided, so far as is most directly material for present purposes, as follows:

> "*78.1 The Shareholders may resolve by Special Resolution proposed at the Annual General Meeting held in the year 2014 to wind up and dissolve the Company with effect from 31 December 2015 subject to the right to extend the effective date of the winding up for a further two consecutive years but in no event shall such a period extend beyond 31 December 2017.*
>
> *78.2 If no Special Resolution is approved at the Annual General Meeting pursuant to Bye-Law 78.1, the Company may hold a Special General Meeting to determine the date, if any, on which the winding up and liquidation of the Company shall occur..."*

57. It is explicitly provided by 78.2 that an alternative winding-up date to those mentioned in 78.1 can be approved at an SGM if the 2014 AGM does not approve a winding-up for 2015 or 2017 under 78.1. This meaning is so clear that any inconsistent wording in other documents is immaterial for the purposes of the relevant

construction analysis. The Placing Memorandum and other 'Core Documents' are not for these purposes (determining the scope of voting rights) contractually binding: *Culross Global SPC-v- Strategic Turnaround Master Partnership Ltd.* [2010] UKPC 33 at paragraph 31.

58. I find that Mr Diel was correct to contend that this Bye-Law clearly envisaged that the 2014 AGM would address the winding-up issue. The Fund is entitled to retort, so what? This specific obligation was substantially complied with in any event: the AGM effectively resolved to extend the duration of the Fund indefinitely through amending the Bye-Laws to delete 78.1 and 78.2 altogether. Of course, whether the Management Shareholder alone had the right to vote is the primary issue. In my judgment these clauses make no sense at all if the Fund could, at its own election, not bother to table the winding up resolution at all. As CPS's counsel argued, "*may resolve*" speaks permissively about the way the votes may be cast, not about the tabling of the Special Resolution itself. On the other hand, CPS's contention that the clauses provide a mandatory winding up date of December 31, 2017 is clearly unsupportable on any sensible reading of the relevant language.

59. In my judgment what happened in the lead up to the 2014 amendments, including the Appleby "opinion" which the Fund declined to accept, is (for construction purposes) essentially a red-herring, save in one respect. Pre-amendment documented events vividly illustrate that, without trawling back over and invoking the 2007 drafting history, (even if only for purposes collateral to construing the Bye-Laws) Bye-Law 78 was far more amenable to CPS's interpretation than the Fund now suggests. The points in favour of CPS's argument that Bye-Law 78 originally envisaged Participating Shareholders voting on winding up may be summarised as follows:

- the term "Shareholders" as defined embraces both Management and Participating Shareholders;

- it is commercially logical for the Participating Shareholders to be entitled to vote on winding up as they had no other redemption rights;

- the defined term "Special Resolution" was only elsewhere used substantively in Bye-Law 83 in relation to Participating Shareholders and only really made sense at all in relation to multiple shareholders rather than a single Management Shareholder;

- the term "Special Resolution", more importantly still, only makes sense in relation to Participating Shareholders as the voting rights conferred on the Management Shareholder are only "ordinary" voting rights;

- Bye-law 78.3 on any commercially sensible view conferred post-winding up voting rights on Participating Shareholders. If "Shareholders" included Participating Shareholders in 78.3, it was logical for the same word to include them in 78.1 and 78.2;

- accordingly, resolving any ambiguities against the Fund, the only proper construction of Bye-Law 78 as adopted in 2007 is that contended for by Mr Diel for CPS.

60. As far as the alternative contention that Bye-Law 78.1-78.2 conferred voting rights solely on the Management Shareholder is concerned, the analysis may be summarised as follows:

    - the commercial object of the Fund was to provide a long-term passive investment in natural resources in Kazakhstan in which investors had no automatic redemption rights and no right to control the management of the Fund through voting in general meetings. This facilitated a 'light-touch' regulatory ISE listing;

    - the parties involved in drafting the original Byelaw 78 (including CPS) expressly agreed to deprive Participating Shareholders of the right to vote on winding up, so the suggestion today that such an outcome "flouts commercial common sense" is simply untenable;

    - the only express voting rights conferred on Participating Shareholders was if there was to be a change of investment purpose (Bye-Law 83);

    - the Bye-Laws unambiguously provided that only the Management Shares carried the right to vote in general meeting, unless otherwise provided. Only Bye-Law 83 expressly conferred voting rights on Participating Shareholders. Bye-Law 78 did not;

    - in the result the only available interpretation of Bye-Law 78 is the construction advanced by Mr Atherton QC on behalf of the Fund.

61. I find that the surrounding commercial context is not a decisive consideration in the context of the present case. It has a neutral effect in determining whether or not "Shareholders" in 78.1-78.2 includes Participating Shareholders. The commercial logic of the Management Shareholder alone voting on winding up is no more compelling than the countervailing contention that Participating Shareholders would have expected a counterweight to the lack of automatic redemption rights. It is true that the Fund's evidence that ISE listing requirements formed part of the rationale for vesting voting rights under Bye-Law 78 solely in the Management Shareholder's hands. However, I was not referred to any direct evidence suggesting that the ISE listing pivotally turned on denying Participating Shareholders special voting rights in relation to winding up altogether. Participating Shareholders were expressly given voting rights under Bye-Law 83 in relation to any change of investment objective during the Fund's first three years after listing. Participating Shareholders were also implicitly given voting rights under Bye-law 4 ("Modification of Share Rights"). Participating Shareholders were, on any sensible view, embraced by the term "Shareholders" in 78.3, a clause which is admittedly of far less significance as it deals exclusively with voting rights post-liquidation.

62. The most important preliminary consideration in favour of CPS's construction is that the Bye-Laws do contemplate that Participating Shareholders will have special voting rights. This is clear from the way the rights attaching to those shares are defined and the voting rights which are unarguably conferred:

    - **Bye-law 3**: "*3.2 Participating Shares*

      The holders of the Participating Shares of each Class or Series of a Class

      3.2.1 save to the extent provided by the Act and in these Bye-Laws shall not be entitled to receive notice of, nor to attend or vote at, general meetings of the Company" (voting rights are not excluded altogether);

    - **Bye-law 4.1**: the rights attached to any class of shares may be modified with the consent in writing of 75% of the class "*or with the sanction of a resolution passed with a like majority at a separate general meeting of the holders of such shares*";

    - **Bye-law 83**:

      "*The investment objective and policies of the Company during the period of three years from the date of admission of the Participating Shares to the Official List of the Irish Stock Exchange may only be changed with the approval of a Special Resolution of the holders of the Participating Shares*".

63. Special voting rights are conferred both implicitly (Bye-law 4.1) and explicitly on Participating Shareholders. Consistent with this approach in the substantive provisions of the Bye-Laws, "Management Shares" are defined as "*ordinary voting*", and Participating Shares as "*non-voting*". Bye-law 4.1 upon which Mr Diel relied is more significant because Bye-law 78 contains no express reference to Participating Shareholders either. Bye-law 83 is somewhat neutral or favours the Fund's construction because it explicitly references Participating Shareholders.

64. The second significant preliminary point in favour of CPS's construction is the definition of "Special Resolution":

    > " *'Special Resolution' means a resolution requiring the consent of not less than three-fourths of the Shareholders passed in general meeting or, where required, of a separate class or separate classes of shareholders passed in a separate general meeting or in either case adopted by resolution in writing, in accordance with these Bye-Laws*"

65. Since the Bye-Laws create two main classes of shareholder and expressly contemplate that Participating Shares may be divided into different classes or series within a class

(Bye-law 2.2), something not contemplated in relation to Management Shares, the concept of a Special Resolution fits more naturally with Participating Shareholders in the commercial context of a single Management Shareholder company.

66. These preliminary points in my judgment put CPS narrowly but clearly ahead in the race when one comes to construe Bye-Law 78 itself. They beg the question why (it being established that Participating Shareholders are clearly conferred special majority voting rights in special cases), a clause requiring a special majority vote on an event as non-ordinary as winding up should be construed as conferring rights only on Management Shareholders? The two paragraphs in question read as follows:

> "*78.1 The Shareholders may resolve by Special Resolution proposed at the Annual General Meeting held in the year 2014 to wind up and dissolve the Company with effect from 31 December 2015 subject to the right to extend the effective date of the winding up for a further two consecutive years but in no event shall such a period extend beyond 31 December 2017.*
>
> *78.2 If no Special Resolution is approved at the Annual General Meeting pursuant to Bye-Law 78.1, the Company may hold a Special General Meeting to determine the date, if any, on which the winding up and liquidation of the Company shall occur.*"

67. In my judgment it is on balance clear and free from ambiguity that the relevant Bye-law provisions apply, as Mr Diel primarily argued, to Management and Participating Shareholders. It is impossible to fairly read the word "Shareholders" as meaning "Participating Shareholders" alone, because that limitation is not expressed (as it was in Bye-Law 83). Although Bye-Law 78.3 is not directly relevant because it deals with voting post-winding up, the term "Shareholders" in that context clearly embraces both Management and Participating Shareholders, because it is patently absurd to read the clause as empowering the Management Shareholder alone to make decisions in relation to Participating Shareholders' priority distribution rights. 78.3 provides, so far as is relevant for present purposes:

> "78.3 *If the Company is wound up, the liquidator may, with the sanction of a Resolution of the Shareholders and any other sanction required by the Act, divide among the Shareholders in cash or kind the whole or any part of the assets of the of the Company (whether they shall consist of property of the same kind or not) and may for such purposes set such values as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the Shareholders or different classes of Shareholders…*"

68. The proposition that 78.1-78.2 also applies to Management Shareholders has practical ramifications which were not to my mind explicitly addressed in argument. In the

commercial context of the way in which the Fund was structured, does it make sense to construe Bye-Law 78 as intended to confer a voting right on Participating Shareholders which could be vetoed by the sole Management Shareholder? Does it not make more commercial sense (and is it not more in line with CPS's broader commercial logic argument) for the last word to lie with the Participating Shareholders, as they are the ones who are given priority distribution rights upon a winding up? In other words, the Management Shareholders might want to wind up but requires investor approval. Conversely, the Management Shareholders does not want to wind up, but the Participating Shareholders can force an exit. Otherwise, what useful purpose is served by conferring a vote on Participating Shareholders at all? These were arguments that CPS did not advance and, on reflection, could not have (in the face of the plain language of the clauses) prevailed.

69. It is entirely consistent with the wider context of the Bye-Laws in their commercial context, as contended for by Mr Atherton QC for the Fund, to read 78.1-78.2 as requiring a Special Resolution of both Management and Participating Shareholders with this practical result. Having rejected the unlikely argument that Bye-Law 78 contained a Long-Stop Date, the Fund could only have been wound up if both the Management and Participating Shareholders agreed. The default position in the absence of consensus was that the Fund would continue as it was intended to be of unlimited duration. What Bye-Law 78 essentially required was for the Management Shareholders to afford Participating Shareholders an opportunity to express their views. If the Management Shareholder favoured winding-up, this judgment could not be foisted onto the Participating Shareholders without their consent. On the other hand, conversely, if the Participating Shareholders wished to wind up but the Management Shareholder did not, the investors lacked the power to foist their choice on the Management Shareholder who was for all ordinary purposes the sole shareholder competent to make management decisions for the Fund.

70. This construction result is difficult to arrive at when one knows that this effect was not actually intended by the drafters of the relevant clauses. However, to the extent that there was any ambiguity as to the meaning of Bye-law 78.1 and 78.2, those ambiguities would fall to be resolved against the Fund. Properly analysed, however, the construction CPS contended for and which I accept did not confer quite as powerful a right as CPS suggested. It was, in effect, a right to be consulted on the winding-up exit route after seven years, not a right to unilaterally exercise the exit option.

Reasonable expectations of the Petitioner as to what the Core Documents meant

71. Having accepted CPS's construction argument in part, and found that Bye-Law 78.1 and 78.2 did confer voting rights on both the Management Shareholder and the Participating Shareholders, it remains to deal briefly with the remaining limb of the alternative plea. Namely that CPS was reasonably entitled to assume that the investment was made on terms that the Fund would be wound up no later than December 31, 2017 even if the Bye-Laws did not have this effect.

72. Mr Atherton QC mercilessly cut this always weak and tenuous argument to shreds. He did so by demonstrating, primarily by reference to the drafting history of the initial Bye-Law and the Board records of the prelude to the 2014 amendments, that CPS clearly understood or must be deemed to have understood before they acquired the bulk of their present shareholding shortly prior to the presentation of the present Petition:

    (1) that Bye-Law 78 was explicitly designed to empower the Management Shareholder alone to vote on the winding up issue; and

    (2) that Bye-Law 78 was <u>not</u> intended to create a Long-Stop Date for the Fund which could be enforced by the investors.

73. Ignoring the compelling evidence of CPS's actual understanding in relation to the duration of the Fund issue, I would still reject the argument had it been advanced by a complete stranger to the Fund's internal affairs. The high point of CPS's case on the Core Documents was that the following express representations were made of a year end 2017 Long-Stop Date:

- "*Investment Term The term of the Company commencing on the date of issue of the Participating Shares and ending on such date as may be determined by the holders of the Management Shares by Special resolution at the general meeting held in the year 2014, being 31 December 2015 or such later date as so determined but in no event later than 31 December 2017.*" (Placing Memorandum, definitions);

- "…*The intended investment term is seven years, subject to reduction or extension as provided herein. The Company is a closed-end company. Shares in the Company are not redeemable or re-purchasable at the option of the investor.*" (Placing Memorandum, page 98 of 98);

- "*Investment Term*" was defined in the Prospectus in the same way as in the Placing Memorandum.

74. It is difficult how any 'outsider' could reasonably expect a fixed term investment reading the Placement Memorandum and the Prospectus as a whole, let alone reading those documents with the Bye-Laws which any reasonable subscriber would appreciate was the governing document. Only the definitions clauses in the Placement Memorandum and the Prospectus unambiguously represented that the investment term would end no later than year end 2017. Substantive clauses in each document made it clear that a longer than seven year term was possible and stated that the Fund was of unlimited duration and cautioned that investment was only suitable for those seeking a long-term investment. Bye-Law 78, read in a straightforward way, was consistent with the other Core Documents, although perhaps far clearer, in signifying that the December 31, 2017 winding up date was an optional one.

75. The reasonable expectation plea fails.

Just and equitable grounds for winding-up

76. Mr Diel submitted that the principles most relevant to the present Petition were to be found in the Judicial Committee of the Privy Council case of *Loch-v-John Blackwood Ltd* [1924] A.C 783. I agree. Lord Shaw opined (at page 790) as follows:

> "*It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs.*"

77. These principles were not in dispute. Mr Atherton QC referred the Court to various authorities, including the Caymanian Grand Court decision in *Re The Washington Special opportunity Fund*, FSD No. 151 of 2015, Judgment dated March 1, 2016 (unreported). In the latter case, in which Mr Atherton QC successfully appeared for the fund, Ingrid Mangatal J refused to wind up the fund because its management's conduct did "*not cross the forbidden line so as to constitute a visible departure from the standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect*" (transcript, at page 59).

78. In my judgment there is no room for sensible doubt in the present case that if CPS's central complaint were to be fully made out, it would be, *prima facie*, just and equitable for the Fund to be wound up. The central complaints are that (1) the Management Shareholder unlawfully amended the Bye-Laws to deprive the Participating Shareholders of their contractual right to vote on when the Fund should be wound up, and (2) unlawfully deprived the Participating Shareholders of their contractual right to exit the Fund through a winding up no later than December 31, 2017 (the so-called Long-Stop Date). CPS further (and crucially) complains that this action was carried out by the Fund's management in bad faith in the knowledge that CPS's share rights were being modified without its consent. In light of the construction I have placed on Bye-Law 78, the position is that:

> (1) CPS has succeeded in establishing that Bye-Law 78 conferred voting rights on Participating Shareholders which the Management Shareholder unlawfully expropriated through the 2014 amendments;
>
> (2) CPS has failed to establish that Participating Shareholders were deprived of a positive right to a winding up by December 31, 2017; and
>
> (3) the voting rights which CPS and other Participating Shareholders were deprived of in substance were consultative voting rights in the sense that unless the Management Shareholder also voted in favour of winding up,

the Participating Shareholders' Special Resolution alone was insufficient to carry the day and enable them to actually exercise the winding up option.

79. In the Fund's Skeleton Argument, it was submitted that the decision to amend "*was made in good faith …for the proper purposes of the Fund*" (paragraph 42). In my judgment the preponderance of the evidence relating to how the 2014 Bye-Law amendments took place is inconsistent with any bad faith finding, a finding upon which the success of the Petition crucially depends. If the conduct of which CPS has complained and has established unlawfully occurred[6] had not occurred, it seems obvious (or highly likely) that CPS would be in no better position. The Management Shareholder would simply have blocked any Participating Shareholder Special Resolution in favour of winding up. The wrong that has occurred is more technical and formal than substantive in its effects.

80. Had CPS wished to seriously pursue its bad faith complaint, it ought to have applied at the directions stage for leave to cross-examine the Fund's deponents. It is noteworthy that in *Re The Washington Special Opportunity Fund*, FSD No. 151 of 2015, where the Caymanian Grand Court fully explored (and rejected) bad faith allegations on the hearing of a just and equitable petition, live witnesses appeared and were subject to cross-examination. Such an exercise in the present case would only likely have consumed more time and costs without affecting the final result. Ostensibly this expensive full factual inquiry was not pursued at the interlocutory stage because CPS contended that it would be able to legally establish an entitlement to a winding up order as of right based on the wishes of the overwhelming majority of Participating Shareholders. No or no tenable legal basis for such a potential finding was ultimately advanced. Section 161(a) of the Companies Act confers jurisdiction to wind up a company on the ground that "*the company has by resolution resolved that the company be wound up by the Court*". This jurisdiction could not be invoked in the present case because no such resolution had been passed. These proceedings have merely determined that the Fund's Bye-Laws, as CPS itself contended, did contemplate that the passing of Special Resolutions of all Shareholders of the Fund could have achieved such a result.

81. The contemporaneous documentary record clearly shows in any event that there was initial uncertainty at the Board level about whether or not Participating Shareholders were entitled to vote. An informal Appleby opinion suggested that they were so entitled. Absent oral evidence and cross-examination, I see no sufficient basis for accepting the argument advanced by way of submission that the Fund changed lawyers primarily with a view to obtaining a more favourable opinion. The Fund's explanation that this was because of non-responsiveness was explicitly advanced before the change of lawyers occurred and not contested by CPS's nominee director on the Board at the time.

82. There are no grounds for finding that it was unreasonable for the Fund to rely on the well-reasoned Cox Hallett Wilkinson opinion on a point of Bye-Law construction.

[6] In the sense of being contrary to the Bye-Laws, properly construed.

The point was one which this Court has found to be a very challenging issue to resolve. That second opinion was far more credible, on its face, than the preliminary off-the-cuff Appleby advice which was, it must be remembered, inconsistent with what the Bye-law's draftsman within the same firm had affirmed she actually intended Bye-Law 78 to mean. Despite Mr Diel's best efforts to discredit the Fund's seeking out a 'second' more favourable decision, I find that the present circumstances do not even arguably reflect a case of opinion shopping by directors resulting in a decision being made based on dubious or "duff" advice.

83. It follows that the Petition must be dismissed because CPS has failed to prove that any conduct capable of giving rise to a "*justifiable lack of confidence in the conduct and management of the company's affairs*" (*Loch-v-John Blackwood Ltd* [1924] A.C 783 at page 790) occurred. In other words, I find that the Fund's management's conduct did "*not cross the forbidden line so as to constitute a visible departure from the standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect*": *Re The Washington Special Opportunity Fund*, FSD No. 151 of 2015, Judgment dated March 1, 2016 (Mangatal J, at page 59).

Conclusion

84. I find that the Petitioner has failed to make out a case for a just and equitable winding-up because I reject its central thesis that the Fund, acting in bad faith, appropriated the rights of the Participating Shareholders to vote in 2014 under Bye-Law 78 on whether the Fund should be wound up at year end 2015 or, at the latest, year-end 2017. Voting rights were conferred on Participating Shareholders, but their wishes could be blocked by the Management Shareholder whose support was required in any event for any resolution in favour of winding up to be passed. The Fund acted reasonably in introducing the 2014 Amended Bye-Laws and by acting in accordance with credible legal advice.

85. I will hear counsel if required on the terms of the final Order to be drawn up to give effect to this Judgment. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the Respondent's costs of the Petition shall be paid by the Petitioner, to be taxed if not agreed.

Dated the 14th day of July, 2017 _____

IAN RC KAWALEY CJ